IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ERIC J. HOLDEN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11782 Trial Court No. 3PA-08-1950 CI MEMORANDUM OPINION No. 6376 — September 7, 2016

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. June Stein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Eric J. Holden appeals the superior court's denial of his application for post-conviction relief. He claims that his trial attorney provided ineffective assistance when the attorney assured Holden that he would receive *Nygren* credit (*i.e.*, credit against his sentence of imprisonment) for the time he spent released on electronic monitoring.[1] For the reasons explained in this opinion, we conclude the superior court did not err in rejecting Holden's claim.

Procedural and factual background

In November 2003, Holden was arrested and charged with felony driving under the influence and felony breath-test refusal. After a number of delays and continuances, Holden's case was set for trial in October of 2004.

On the day the trial was to start, Holden's attorney informed Superior Court Judge Eric Smith that he was negotiating a plea agreement with the State, and he asked for a continuance to complete the negotiation. Judge Smith gave the defense attorney a one-day continuance.

The next day, Holden's attorney announced that they had resolved the case. Under the plea agreement, the State would dismiss the felony driving under the influence charge, and Holden would plead guilty to the felony breath-test refusal charge. Because Holden had two prior felonies, he faced a presumptive term of 3 years to serve. As part of the plea agreement, the State agreed that it would not file any statutory aggravating factors and also agreed that Holden would be allowed to propose statutory mitigating factors and to argue for a sentence below the presumptive term. The State also agreed

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[1] *See Nygren v. State*, 658 P.2d 141, 146 (Alaska App. 1983), *superseded by* AS 12.55.027 (adopted in 2007), *as stated in McKinley v. State*, 275 P.3d 567 (Alaska App. 2012).

that it would take no position on Holden's anticipated motion to delay his remand into custody.

At the change of plea hearing, Judge Smith asked Holden if, aside from the terms described above, there had been any other promises made to him with regard to this plea agreement. Holden personally confirmed that no other promises had been made. At the time of the change of plea hearing, Holden was on bail release under the supervision of a court-ordered third-party custodian. He had previously been denied release on electronic monitoring, although he had a new application pending and hoped to be released on electronic monitoring soon. But, as Holden's answers to the judge's questions made clear, Holden understood that the plea agreement did not include any promises about whether he would ever be released on electronic monitoring or be granted the delayed remand he was seeking. Nor did it include any promises about *Nygren* credit for the electronic monitoring.

Following the colloquy with Holden, Judge Smith accepted Holden's plea and set the sentencing hearing for a later date. In the interim, Holden remained on bail release under the twenty-four hour supervision of his third-party custodian.

A few weeks later, Holden was found drinking at a bar without his third-party custodian. He was arrested and jailed. At a subsequent bail review hearing, the judge allowed Holden to be released on electronic monitoring with a performance bond. This was the first time that Holden had been released on electronic monitoring during this case.

Around this same time, Holden moved to withdraw his plea, asserting that he had been "under duress" when he entered his plea because the trial court had refused to grant more than a one-day continuance.[2] Judge Smith held an evidentiary hearing at

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[2] *See Holden v. State*, 2007 WL 2216605, at *3 (Alaska App. Aug. 1, 2007) (continued...)

which Holden testified. After hearing Holden's testimony, the judge denied Holden's motion to withdraw his plea. The judge found that Holden's claim of duress was not credible and that Holden was trying to manipulate the system and delay his sentencing.

Holden was later sentenced to 30 months to serve on the felony breath-test refusal conviction. Judge Smith also granted Holden's requested delayed remand and allowed Holden to remain on electronic monitoring until his appeal of the denial of his motion to withdraw his plea was resolved by this Court.

Holden's motion for Nygren credit

The superior court's denial of the motion to withdraw plea was affirmed by this Court in August 2007.[3] Following the resolution of this appeal, Holden applied for *Nygren* credit for the time he had spent on electronic monitoring while his sentencing and appeal was pending.

The superior court denied Holden's request for *Nygren* credit based on a recent decision by this Court, *Matthew v. State*,[4] which had been issued after Holden changed his plea but before he moved for *Nygren* credit. In *Matthew*, we held that private electronic monitoring bail release programs were generally *not* sufficiently restrictive to qualify for *Nygren* credit under AS 12.55.025(c).[5]

Holden appealed the superior court's denial of *Nygren* credit to this Court, arguing that the electronic monitoring program was more restrictive than the program in

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[2] (...continued)
(unpublished).

[3] *See id.* at *1.

[4] 152 P.3d 469 (Alaska App. 2007).

[5] *Id.* at 473.

Matthew and he was therefore entitled to credit.[6] We rejected this argument, concluding that Holden's private electronic monitoring program was not sufficiently restrictive and could not be meaningfully distinguished from other cases where credit had been denied.[7]

Holden subsequently applied for post-conviction relief seeking to withdraw his plea on the ground that his trial attorney had committed ineffective assistance of counsel. That is, Holden alleged that his trial attorney had erroneously and incompetently advised Holden that private electronic monitoring programs qualified for *Nygren* credit, and he further alleged that he would not have entered his plea had his attorney advised him that there was a possibility that he would not receive *Nygren* credit for this time.[8]

After holding an evidentiary hearing,[9] Judge Smith denied Holden's application for post-conviction relief. Specifically, the court found that the advice the trial attorney gave was not incompetent at the time it was given because, at the time of the change of plea, the Palmer courts were routinely granting this type of credit for private electronic monitoring.

The court also found that, even if the advice qualified as incompetent, Holden had failed to show that he was prejudiced by the advice because he was willing to change his plea knowing that he might not receive his requested delayed remand or even be released on electronic monitoring in the first place.

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[6] *Holden v. State*, 2009 WL 4093377 (Alaska App. Nov. 25, 2009) (unpublished).

[7] *Id.* at *1.

[8] *See Garay v. State*, 53 P.3d 626, 628 (Alaska App. 2002).

[9] *Holden v. State*, 2013 WL 1558121, at *3 (Alaska App. Apr. 10, 2013) (unpublished).

Why we affirm the superior court's denial of Holden's ineffective assistance of counsel claim

To establish a claim of ineffective assistance of counsel under Alaska law, a defendant must prove that he is entitled to relief under both prongs of the test set forth in *Risher v. State*.[10] That is, the defendant must show (1) that the defense attorney's performance fell below an objective standard of minimal competence, and (2) that there is a reasonable possibility that the defense attorney's incompetence contributed to the outcome of the case.[11]

With regard to the first prong, an attorney is incompetent if he or she provides "a level of performance that no reasonably competent attorney would provide" under the circumstances.[12] Here, the superior court found that Holden's defense attorney's advice about *Nygren* credit for electronic monitoring was not incompetent because, at the time the advice was given, the Palmer courts were routinely giving *Nygren* credit to defendants who were released on electronic monitoring, and most criminal defense attorneys in Palmer assumed that this practice would continue. The superior court also found that Holden's attorney's "failure to mention that the law might change" did not constitute incompetence — because an attorney is generally not incompetent for failing to predict a change in the law, or for failing to predict that an appellate court might give a new interpretation to existing law.[13]

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[10] 523 P.2d 421 (Alaska 1974).

[11] *Id.* at 424-25.

[12] *State v. Jones*, 759 P.2d 558, 568 (Alaska App. 1988) (citing *Brown v. State*, 601 P.2d 221, 234 (Alaska 1979)).

[13] *See Galvan v. State*, 2000 WL 1350597, at *3-4 (Alaska App. Sept. 20, 2000) (unpublished) (concluding that the defendant's attorney was not ineffective for failing to (continued...)

The superior court's findings are well-supported by the record and we agree with the superior court that Holden has failed to show that his attorney was incompetent for advising him that he would receive credit from the Palmer courts for time spent on private electronic monitoring and for failing to anticipate that this practice would later change.[14]

The superior court's findings on the lack of prejudice are also well-supported by the record. The court found that Holden had failed to show prejudice because he accepted the plea (which resulted in a dismissal of a felony charge and an opportunity for a sentence under the presumptive term for the remaining felony charge) knowing that he might never be placed on electronic monitoring or receive his delayed remand and therefore might never be in a position to request *Nygren* credit in the first place.

Based on this record, we conclude that the superior court correctly denied Holden's application for post-conviction relief.

Conclusion

The judgment of the superior court is AFFIRMED.

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[13] (...continued)
anticipate that the trial court would restrict the defendant's parole eligibility, a decision the record suggested was "exceedingly rare" at the time the defendant was sentenced); *Hufana v. State*, 1999 WL 716509, at *1 (Alaska App. Sept. 15, 1999) (unpublished) (concluding that an attorney "need not demonstrate prescience concerning the future actions of the United States Congress" in providing legal advice to clients).

[14] *Id.*